United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1018

To be submitted

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1018

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOSEPH GAMBINO,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

MARK A. SPEISER,
Special Attorney,
United States Department of Justice.

JOHN C. SABETTA,
Assistant United States Attorney,
Of Counsel.

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Preliminary Statement

Joseph Gambino appeals from an order of the United States District Court for the Southern District of New York, filed on December 16, 1975, by the Honorable Charles H. Tenney, United States District Judge, denying Gambino's motion under Rule 33 of the Federal Rules of Criminal Procedure for a new trial based on newly discovered evidence.

Indictment 72 Cr. 648, filed June 1, 1972, charged Gambino in one count with falsely representing that he was a citizen of the United States, in violation of Title 18, United States Code, Section 911. Trial before Judge Tenney and a jury commenced on January 30, 1973 and concluded on February 2, 1973, when the jury found Gambino guilty. On April 17, 1973 Gambino moved for a new trial on the ground of "newly discovered evidence". That same day Judge Tenney denied the motion without an evidentiary hearing and immediately thereafter sen-

tenced Gambino to a one-year term of imprisonment, the execution of which was suspended, one year's probation and a fine of $750.

Gambino appealed his conviction to this Court, which affirmed without opinion on September 26, 1973 (Moore, Mansfield and Oakes, *C.J.J.*) 483 F.2d 1399. The Supreme Court subsequently denied *certiorari*, 416 U.S. 982 (1974).

On October 24, 1974, Gambino moved pursuant to 28 U.S.C. § 2255 to vacate his conviction on grounds not pertinent here. That motion was denied by Judge Tenney by order filed January 30, 1975. Judge Tenney's denial of Gambino's 2255 motion was affirmed by this Court without opinion on May 29, 1975. 516 F.2d 896.

On September 18, 1975, Gambino filed a second motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure, based on allegedly "newly discovered evidence". The motion was denied by Judge Tenney by order filed December 16, 1975 and the instant appeal followed.

Statement of Facts

The Government charged and proved at trial that at an interview conducted by Special Agent Edwin Taylor of the Federal Bureau of Investigation on June 7, 1967, Gambino falsely stated to Taylor, among other things, that he had become a United States citizen in 1960.* It was conceded at trial that Gambino was not and never had been a citizen. His defense at trial was that Special

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* Some of the other false statements Gambino made to Agent Taylor at this interview are summarized at pp. 3-4 of Gambino's Brief on his appeal from Judge Tenney's denial of his section 2255 motion, Dkt. No. 75-1083.

Agent Taylor had never asked about his citizenship and that, in any event, any false statement about his citizenship resulted from Gambino's unfamiliarity with the English language. Both of these contentions were overwhelmingly rebutted by the evidence and were rejected both at trial and by this Court on direct appeal.

In addition to Special Agent Taylor's testimony, the Government supported its contention that Gambino intentionally made a false statement of United States citizenship by adducing evidence of numerous prior similar acts, including:

1. That at a sworn Immigration Service interview on September 22, 1967, Gambino admitted to having "worked under" the name of "Joseph Lambino", because he was "not here legally" and was "afraid".

2. That in November, 1960, Gambino applied for a social security card under the name "Joseph Lambino", listing his birth date as "12-24-1934".

3. That Gambino admitted in 1969 to having obtained the "Lambino" social security card because he was afraid of being apprehended by Immigration authoirties.

4. That from 1960 to 1964, Gambino lived at several different Bronx addresses under the name of "Joseph Lambino."

5. That in 1964 Gambino signed a Bronx apartment lease in the name "James Plastina", and continued to pretend to the landlady, Ann Perry, that his name was James Plastina for several years thereafter.*

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* For a more complete statement of the proof at trial, see pp. 2-8 of the Government's Brief on Gambino's direct appeal, Dkt. No. 73-1916.

On April 17, 1973, the date of sentence, Gambino moved for a new trial pursuant to Rule 33 on the basis of two affidavits. In the first one, Frank Garofolo swore that Gambino's English was bad and also that contrary to the testimony of Ann Perry, Gambino's landlord and a Government witness at trial, Perry did know appellant by the name "Joseph Gambino". Garofolo averred that the latter was true since he had heard Perry refer to the appellant by the name "Joseph Gambino" (A-24a).* The second affiffidavit, that of Carlo Conti, attested to Gambino's problems with English and also claimed that Conti had overheard the entire conversation between Agent Taylor and Gambino on June 7, 1967 and that Taylor:

> "only stayed long enough to ask Joe for *his name, his address* and *what his job was.* Joe had difficulty understanding what the man was asking and it took several minutes for Agent Taylor to elicit even *three simple responses.*" (Emphasis supplied) (A-22a).

The clear import of Conti's affidavit was that he had been a witness to the relevant conversation and that the agent had never asked, and Gambino had never answered, any question addressed to the latter's immigration or citizenship status.

After hearing argument by Gambino's counsel in support of the motion for a new trial, the trial court denied the application. On direct appeal, Gambino assigned the trial court's denial of his new trial motion as one of several grounds of error. This Court, by affirming the conviction without opinion, rejected that claimed basis of error as well as all others.

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* References to pages of appellant Gambino's Appendix are abbreviated "A".

The present appeal stems from the trial court's denial of Gambino's second motion for a new trial based on the affidavits of Carlo Conti, Patricia Conti (Carlo Conti's wife), and Edythe and Paul Koerner. This second affiffidavit of Carlo Conti, so far as is material, merely reiterates what he said in his earlier affidavit by making explicit what earlier had been left to implication:

> "He [Agent Taylor] asked questions about the job and the work he [Gambino] was doing *and things like that.* I am positive as I think back that he did not ask Joe anything about when or where he came into this country. I was there for the whole time and I heard no question from the agent and no answer from Joe which talked about in any way Joe's immigration status or when or where he came to the United States." (Emphasis supplied) (A-14a).

Patricia Conti and Edythe and Paul Koerner allege in their affidavits (A-9a-13a) that Ann Perry knew the appellant by the name "Joseph Gambino". In substance, this is the exact contention raised by the Garofolo affidavit submitted by Gambino on April 17, 1973 in support of his first motion for a new trial.

ARGUMENT

POINT

The trial court properly denied Gambino's motion for a new trial.

Gambino's contention that the trial court erred in denying his motion for a new trial based on newly discovered evidence and that such denial constituted an abuse of discretion is utterly lacking in substance. Moreover, in material part, the bases for relief relied on here are

identical to those already rejected by both the trial court and this Court in connection with Gambino's first new trial motion. Accordingly, redetermination of Gambino's current contentions is barred by *res judicata*.

The affidavits submitted by Patricia Conti and Edythe and Paul Koerner in support of Gambino's second new trial motion contain allegations which, in substance, are identical to, and cumulative of, those set forth in the earlier affidavit of Frank Garofolo submitted in support of the first new trial motion—namely, that contrary to her testimony, Ann Perry did know the appellant by the name "Joseph Gambino." With respect to the "new" affidavit of Carlo Conti, it merely makes explicit the contention which was clearly implicit in Conti's first affidavit (see, *supra*, pp. 4-5). Gambino has already had his day in court with respect to these asserted bases for relief, and the trial court so found.

In denying the instant motion Judge Tenney found that "the Conti . . . affidavit has been previously considered on a Rule 33 motion and the motion thereafter denied" (A-31a) and that "all other affidavits in support are merely cumulative" (*ibid*). Those findings are amply supported by the record. Accordingly, relitigation of the merits of these matters is barred by the doctrine of *res judicata*. *Burns* v. *United States*, 229 F.2d 87 (8th Cir.), *cert. denied*, 351 U.S. 910 (1956); *United States* v. *Stephan*, 50 F. Supp. 445 (E.D. Mich.), *aff'd*, 139 F.2d 1022 (6th Cir.), *cert. denied*, 318 U.S. 781 (1943).

Furthermore, even the briefest consideration of the merits of Gambino's current appeal is sufficient to demonstrate that it is utterly frivolous. At the threshold, it is settled that a motion for a new trial is "not favored and should be granted only with great caution." *United States* v. *Costello*, 255 F.2d 876, 879 (2d Cir.), *cert. denied*, 357 U.S. 937 (1958). "To succeed on such a motion a

defendant must show, *inter alia*, . . . that [the evidence] could not, with the exercise of due diligence, have been discovered sooner, . . . [and] that it is so material that it would probably produce a different verdict." *United States* v. *Slutsky*, 514 F.2d 1222, 1225 (2d Cir. 1975). Gambino, utterly failed to meet either of these requirements.

Gambino has made not even a colorable showing as to why he could not, with due diligence, have discovered the evidence before or, at the latest, during trial. See *United States* v. *Schwartzbaum*, Dkt. No. 74-1901 (2d Cir. Nov. 7, 1975), slip op. 461, 468-469. He offered no explanation as to why he did not call as defense witnesses at trial the persons whose affidavits indicate they have known him in excess of ten years and in any event prior to the controverted discussion between Agent Taylor and himself. See *Brown* v. *United States*, 333 F.2d 723 (2d Cir. 1964). Nor has he made any showing of the unavailability before or during trial of those witnesses. This failure of diligence is particularly acute with respect to the allegedly "newly discovered evidence" furnished by Carlo Conti. The latter, according to his own most recent affidavit, "was standing next to Joe [Gambino]" (A-14a) during the entirety of the very conversation Gambino had with Agent Taylor—a conversation which lay at the heart of this rather simple case.

Moreover, the allegedly new evidence would not, in any event, probably have produced a different verdict, as required. The evidence, at best, merely tends to impeach the credibility of Agent Taylor and Ann Perry (a witness who testified solely to one of several similar acts attributed to Gambino). In light of the abundant evidence adduced at trial that Gambino intentionally made a false statement of United States citizenship, his showing here is utterly insufficient to warrant granting the relief requested. See

United States v. *Stofsky*, Dkt. No. 74-1860 (2d Cir. Nov. 7, 1975), slip op. 515, 528-532; *cf. United States* v. *Polisi*, 416 F.2d 573 (2d Cir. 1969).

Judge Tenney's findings that Gambino failed to exercise due diligence and that the "new" evidence was not of such a character that it probably would have produced a different verdict were amply supported by the record and certainly not "clearly erroneous". *United States* v. *Parness*, Dkt. No. 75-1369 (2d Cir. Jan. 12, 1976), slip op. 1463, 1465. Moreover, this Court has said that "[w]here newly discovered evidence is sought to place at issue the credibility of a prosecution witness . . . it [is] important to give deference to the conclusions of the trial judge whose presence at the proceedings gives him a far better vantage than our own for this determination." *United States* v. *Bermudez*, 526 F.2d 89, 100-101 (2d Cir. 1975). In these circumstances, the order of the trial court should be affirmed.

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

MARK A. SPEISER,
Special Attorney,
United States Department of Justice.

JOHN C. SABETTA,
Assistant United States Attorney,
Of Counsel.

★ U. S. Government Printing Office 1976— 614—354—NYJSF—44

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

MARK A. SPEISER, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 24th day of March, 1976 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

Michael Rosen, Esq.
Saxe, Bacon & Bolan
39 East 68th Street
New York, New York 10021

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Mark A. Speiser
MARK A. SPEISER

Sworn to before me this

24th day of March, 1976

Jacob Laufer

JACOB LAUFER
Notary Public, State of New York
No. 24-4609171
Qualified in Kings County
Commission Expires March 30, 1977